REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1263 OF 1992

MADHUPAPER INTERNATIONAL LTD & ANOTHER… PLAINTIFFS

VERSUS

KENYA COMMERCIAL BANK LTD & 2 OTHERS……..DEFENDANTS

JUDGMENT

In this suit the two plaintiffs raise a restitutionary claim, to claim a sum of money, Shs 56,000,000, from the defendants, on the now well-known principle unjust enrichment whose object is the reversal of a defendant's unjust enrichment or unjust benefit received at the undeserved expense of a plaintiff, and in this case, by means of duress and coercive pressure.

Forming the foundation of quasi-contractual claims, such as actions for money had and received, and for money paid to a third party from which the defendant has derived a benefit, and equitable relief from undue influence and catching bargains, amongst other restitutionary claims, the idea of unjust enrichment or unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the plaintiff. The gist is that a defendant, upon the circumstances of the case is obliged by the ties of natural justice and equity to make restitution. As Lord Goff of Chieveley and Professor Gareth Jones state in their monumental treatise, *The Law of Restitution*, 5th edn (1998), at pp 11-12:

"Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment."

This statement is founded on the observation of Lord Wright in the English case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, [1943] AC 32, at p 61 where he said:

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit ……. such remedies …… are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

And, indeed, as a remedy attracting wrong, unjust enrichment was well known in our courts fairly early. Thus, as far back as 1957, we see it spoken of by the then Court of Appeal for Eastern Africa comprising of judges of eminence, namely, Sir Newnham Worley, P, Sir Ronald Sinclair, V-P, and Briggs, J A, in the case of *Saleh bin Ghaleb v Hussein al Qu'aiti*, [1957] EA 55, at p 73, where one finds this passage, vis, "so far as the allowances are concerned, this was a clear case of unjust enrichment" leading to a suffering of wrongful loss of which equity would provide a remedy.

Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment

and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, will not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice:

"Woe unto the day when it is lost sight of in Kenya, which would also be contrary to the spirit of section 3(c) of the Judicature Act. I trust that in future, in appropriate cases, there will be less smothering of just equitable rights" on the basis of technical objections and artifical distinctions oblivious to justice and substance.

This was the emphatic language of Madan, JA (as he then was), in the Court of Appeal of Kenya, in the case of *Chase International Investment Corporation and another v Laxman Keshra and others*, [1978] Kenya LR 143, at p 154, where it was firmly and unequivocally laid down that in

Kenya a claim may properly be founded for restitution where it would be unjust to allow a party to retain the benefits of an unjust enrichment.

In asserting the existence of the concept in our law, Madan JA was in the good company of the position in Tanzania, where restitution was also thriving doctrine: see *Riddoch Motors Ltd v Coast Region Co-op* [1971] EA 438 (payment recoverable of a benefit of work accepted) decided by Sir William Duffus, P Law JA and Onyiuke J in the Court of Appeal for East Africa. In Uganda, although money paid under an illegal contract was held not recoverable, restitution as a doctrine was no doubt recognized in *Broadways Construction Co v Kasule and Others* [1972] EA 76 in the

Court of Appeal composed of Law Ag V-P, Lutta and Mustafa JJA. The High Court of Kenya had already applied restitution in relation to stolen money in *Zakayo v Naomi* [1970] EA 607 (Chanan Singh J) on principles used to recover from cheats and blackmailers and robbers, ie quasicontract.

However, uninhibited by the English thinking of the earlier times Chanan Singh J would obviously have openly said that stolen paid to the defendant by a thief was recoverable as an unjust enrichment. He said (at page 609)

"It is a pity that in this age we should have to rely on a patently absurd legal fiction which was necessitated by old forms of action. The forms of action disappeared in England a long time ago but the fictions still remain to camouflage reality and to confound the layman. The doctrine of unjust enrichment would provide a straightforward and intelligible remedy in theses cases.

This doctrine is recognized in United States and even in Scotland .. judges in England have not hesitated to use this term and terms synonymous with it such as '*ex aequo et bono*' and 'higher equity'."

It is in this state of apparent dithering on the part of the High Court with regard to the application of this doctrine in Kenya, that Madan JA's express recognition and application of it is significant and is outstanding in our jurisprudential development. Upon this clear recognition, it behoves us to-day, to peer at the anatomy of restitution, understand the elementary principles in so far as they relate to the case-facts, and apply them to resolve the dispute. The doctrine has been spoke of and recognized as applying in this country, but what its elements and basic structure are, do not appear to have been stated by the courts in this country. No case was brought to my attention and my own researches have not discovered one, in which an East African court has had an opportunity to draw up the skeleton of restitution of unjust enrichment of course, speak of the aspects which will be of help to decide the controversy on the facts found on the evidence Other principles and aspects, not pertinent to the instant facts are not touched.

On the authorities approved by Madan and Wambuzi, JJA (as they then were) in the *Chase International Investment Corporation case* (supra), the basic elements presupposed by the doctrine of unjust enrichment are (1) that the defendant has been enriched by the receipt of a benefit; (2) that he has been so enriched at the expense of the plaintiff; and (3) that it would be unjust to allow the defendant to retain the benefit in the circumstances of the case. These subordinate principles of the general principle of unjust

enrichment are interrelated. They clearly show the nature of restitutionary claims, and how people incur restitutuionary obligations. A full exposition of the general and subordinate principles is not practically possible within the compass of a judgment. Awesome in its comprehensiveness and insight, the widely acclaimed work of Lord Goff of Chieveley and Professor Gareth Jones, *The Law of Restitution*, 5th edn (1998), which is a masterly integration of principles drawn from many different branches of law, provides a good guide on the issue raised in the instant case. In particular, pages 16-41, are instructive on the issue before us.

Leading restitutionists, particularly those in a thriving restitution group in academia, headed by Professor Peter Birks (whose works range from his famous *An Introduction to the Law of Restitution*, 1985, reprinted 1996 in paperback, with revision; to numerous scholarly articles), among others like Professor Richard Sutton, Professor S M Waddams, not to mention Ewan McKendrick, Andrew Burrows, Professor Roy Goode and Professor Samuel Stoljar, outside the American, Canadian and Australian restitution lawyers, have drawn together a mass of cases from apparently disparate areas of the law and provided compedia on the law of restitution based on the underlying and unifying principle of reversing unjust enrichment.

From the now abundantly available literature on the subject of restitution on account of unjust enrichment and in North America and the common law diaspora established judicial recognition and exposition, and a vibrant academic scholarship shown in esteemed monographs and stream of learned articles in world class journals and reviews whose citation is encouraged by the courts as helpful guides one sees that the law on unjust enrichment or unjust benefit is aimed at preventing a person from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. From these sources, it is possible to highlight, albeit in summary fashion for in this space of a judgment, some of the common unjust factors which the law recognizes as calling for restitution. You may call them grounds which form the basis of a restitutionary claim. At the moment I sample the following:

1. non-voluntary conferment of a benefit, such as through mistake or on account of compulsion, necessity, or in ignorance, or due to an unequal condition between the payor and payee;

2. voluntary conferment of benefit for total failure of consideration;

3. benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust;

4. *ultra vires* demand;

5. abuse of a power entrusted to the defendant by Parliament or by a contractual instrument such as a debenture or other agreement;

6. illegitimate use of self-help sanctions;

7. vindication of equitable title to property.

In short, on the part of the plaintiff there must be found, in truth, factors which negative the voluntary character of the transfer of benefit to the defendant. The plaintiff must be found to have had a qualified or vitiated intent that the defendant should be enriched. On the side of the defendant, there must have been free acceptance of the transfer, in the sense that the defendant had a choice whether to accept or reject, and had sufficient knowledge of the facts to make that choice a real one. The defendant must know that a benefit is being offered to him non-gratuitously, and having the opportunity to reject, elects to accept.

Those are some of the most outstanding restitution-yielding events. I am not forgetting situations where the defendant has behaved unconscionably; for we all know equity's long established jurisdiction to set aside a bargain if there is "some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself……. Which in the traditional phrase 'shocks the conscience of the court', and makes it against equity and good conscience for the stronger party to retain the benefit of a transaction he has

unfairly obtained": per Millet, J in *Alec Lobb Ltd v Total Oil GB Ltd,* [1983] 1WLR 87, at 94-95.

On the part of the plaintiff seeking restitution one finds his judgment, in parting with the enrichment to the defendant, vitiated by either not known that the defendant was being enriched at his (plaintiff's) expense, or by being disabled by a mistake or pressure or inequality, to prevent the enrichment of the defendant; and, as it were, his transfer was non-voluntary, in that when surrending the benefit to the defendant he did not form an unimpaired intent to give up what he gave up at his expense or to his detriment. So, when these things or any of them occur and the defendant unjustly gets the benefit, restitution is the law's response thereto, consisting in causing the defendant to give up to the plaintiff the enrichment received at the plaintiff's expense or its value in money. That is how the law responds to cases of non-voluntary transfers of benefits, arising out of vitiated judgment (impaired intent), or failure of condition for transfer.

As it is already clear, in vitiated judgment the plaintiff would be saying either, that he did not know that the defendant was being undeservedly enriched at his (plaintiff's) expense, or that he knew that the defendant was being enriched but he was driven by a mistake, illegitimate pressure or compulsion or unconscionable coercion, or inequality or lack of choice, to give up the enrichment to the defendant. He says, in short, that properly considered in fairness, at no time did he properly intend the defendant to be enriched in the circumstances then obtaining.

On the other hand, failure of condition involves an exercise of judgment with a fundamental qualification. Here the plaintiff has exercised his judgment to the full, but in addition, he has taken pains to qualify the transfer of the enrichment, making it clear that although he wanted the defendant to have the enrichment, his intent to that effect was not absolute but conditional; and then, as events have turned out, the condition has failed; so that with its failure the transfer has become non-voluntary. His case is that indeed he initially formed an unimpaired intent that the defendant be enriched, but only in events other than those which have occurred. That is to say, he specified the basis of his giving, and, therefore, the events in which his intent to give would become absolute; and he never wanted to benefit the defendant except on the basis of the events which have not happened. This is the vocabulary of restitution, for the traditional terminology in common law, of "total failure of consideration".

I wish to point out that because of the facts of the instant case, I am dealing with the law only as it concerns the case of a plaintiff who has himself unofficiously conferred a benefit on the defendant, and he now complains that he was mistaken, or that he acted under compulsion, or that he intervened as a matter of necessity, or that he conferred the benefit under an ineffective transaction. This case does not give rise to a situation where I should consider restitution based on a defendant having received the benefit from a third party; or where he has acquired the benefit through his own wrongful act such as a crime, a tortuous act or a breach of fiduciary relationship or a breach of confidence. But one cannot entirely rule out the element of overlap, for, as it is common, the rubrics of the law are not watertight compartments.

On establishing one of the grounds of a restitutionary claim, the plaintiff is *prima facie* entitled to restitution. But circumstances may be present which may constitute a valid defence to defeat the claim. There are limits to restitutionary claims. For instance, a restitutionary claim may fail (1) if the plaintiff has entered into a compromise or made a payment meaning to waive all inquiry into it, in pursuance of the defendant's honest claim (unless, of course, such payment was induced by misrepresentation or made under duress or undue influence or grudgingly under protest); (2) if public policy precludes restitution (such as in case of *res judicata*, statutes of limitation and laches, illegality, statutory bar); (3) if the defendant cannot be restored to his original position (such as that there can be no *restitutio in integrum*, or that there has been a total failure of consideration), or that he is a *bona fide* purchaser for value without notice; (4) if the defendant has so changed his position which has cancelled out his unjust enrichment, that it would be inequitable in all the circumstances to require him to make restitution at all or in full, and restitution should either be terminated or diminished *pro tanto* (ie that he acted to his detriment on the faith of the validity of the receipt of the enrichment); (5) if the defendant not having requested or acquiesced in the payment, the plaintiff has conferred the benefit as a mere volunteer, ie that the plaintiff was officious, or thrust himself on the defendant, or intervened without adequate justification in short, that he made an unwanted benefit or an uninvited payment when not acting under legal compulsion or

necessity; (6) if the plaintiff conferred a benefit on the defendant while acting in his own self interest in the absence of compelling factors like compulsion, necessity or request; (7) if the plaintiff conferred the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he owed to the defendant; or (8) if the money received was paid out and given by the defendant as a charitable donation. These, and many other defences are fully discussed in all the standard works on restitution, eg in Goff & Jones, *op cit*, at pp 46-72; and Burrows, *The Law of*

Restitution, (1993), Chapter 15, pp 420 – 477.

In the instant case the restitutionary event relied on for the claim is duress, and, in particular, economic duress. The boundaries of duress keep expanding outwards, and even within the categories of duress themselves the extension continues as the circumstances of planet Earth keep changing.

The core feature of duress is illegitimate threats pressurizing the plaintiff into conferring a benefit on the defendant. While it must be stressed that the categories of duress (compulsion) are not closed, at present the main heads are (1) duress of the person; (2) duress of goods; (3) illegitimate threats (other than by a public authority *ultra vires*) made to support a demand for payment above what is statutorily permitted; (4) economic duress; (5) illegitimate threats to prosecute or sue or publish information; and (6) illegitimate threats by public authorities made to support *ultra vires* demands.

Concerning illegitimate threats, know that an implied threat counts as duress; for, if the demand for payment is reasonably construed as carrying with it a threat of particular consequences if the payment is not made it is treated in the same way as if that accompanying threat was expressly spelt out. To borrow Lord Goff's words in *Woolwich Equitable Building Society v I R C* [1992] 3 All ER 737, at 0 753, "In cases of compulsion, a threat which constitutes the compulsion may be expressed or implied". So, for example, if D wrongfully seizes P's goods and demands payment for their release, there is an illegitimate implied threat that no payment, no release. A veiled threat is recognized: see *The Alev*, [1989] 1 Lloyd's Rep 138, at pp 142, 145. As it can be seen, then, duress in law is broader than the layman's concept of it as criminal blackmail.

As I have said, this case was fought on the basis of economic duress, and that is where my focus is. The scope of that doctrine is still unsettled, and extends to any form of economic pressure whereby the threat is the overwhelming or predominant cause of the plaintiff's action, or he intentionally submitted on realizing that there is no other practical choice open to him. Lord Scarman, in *The Universe Sentinel* [1983] 1 AC 366, at p 400. There is this kind of duress if the consequences of a refusal would be serious and immediate so that there is no reasonable alternative open: Kerr, L J, in *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, at p 428. It is now well known, that any pressure which the law does not regard as legitimate is wrongful and amounts to duress; for the law, under the influence of equity, has developed from the old common law conception of duress by threat to life and limb, and has arrived at the modern generalization of simply inquiring whether the plaintiff was subjected to an improper motive for the action per Lord Wilberforce and Lord Simon of Glaisdale in *Barton v Armstrong* (1973), [1976] AC 104, at p 121.

And so, clearly, harassing a debtor is a wrongful act which amounts to duress. It is duress if a person, with the object of coercing another to pay money claimed from the other as a debt due under a contract, harasses the other with demands for payment, which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat of publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation: see *Norweb plc v Dixon*, [1995] 3 All ER 952. Indeed, in some circumstances, it may be wrongful to threaten to do what one is entitled to do; and a threat may not amount in law to blackmail but may nevertheless amount in law to duress because it is made for an illegitimate purpose. Here I am having in mind the illustration provided by the New Jersey case of *Wolf v Marlton Corporation*, (1959), 154 A 2d 625.

In that case, the purchasers having contracted to buy a house, demanded the return of their deposit, accompanying the demand with a threat that if their deposit was not refunded they would resell the property to a purchaser who would be undesirable in the area and that the vendors would not be happy

with the results. Of course these purchasers would have been within their legal rights to resell the house to whomsoever they liked to sell. But the Superior Court of New Jersey held that the threat amounted in law to duress, in that it involved an abuse of legal remedies, and was wrongful in a moral sense. The threat was malicious and unconscionable and "fundamental fairness requires the conclusion that his conduct in making this threat be deemed 'wrongful'": per Freund, JAD, *ibid*, at p 630. So, while abuse of rights may probably not be a tortuous wrong, nevertheless, a threat to abuse one's rights is viewed as illegitimate and justifies restitutionary recovery: generally see Goff & Jones, *op cit*, at pp 308 – 309, 345 – 346. As it was said by Lord Wright in *Thorne v Motor Trade Association*, [1937] AC 797, at pp 822 – 838, it may be duress to threaten to "do an act, which is not unlawful, but which is calculated seriously to injure another." Also see Lord Scarman, in *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel*, [1983] 1 AC 366, at pp 388, 401.

Economic pressure calling for restitutionary intervention by the courts was early exemplified by courts allowing recovery of money paid under duress of goods. *Astley v Reynolds*, (1731), 2 Str 915 led the way. There P pawned his plate to D for £20. After three years he went to redeem it. D insisted on £10 extra as interest. P tendered £4 knowing that sum to be more than the lawful interest. D refused to take it. P ended up paying the £10, and recovered the plate. He successfully recovered the surplus of his money. The Court of the King's Bench had this telling message:

"This is a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied, it must be the party who had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again". (*Ibid*, at p 916; and also see *Ashmole v Wainwright* (1842) 2 QB 837; and *D Owen & Co v Cronk* (1895) 1 QB 265, at p 271, per Lord Esher, MR); and whether seizure is actual or only threatened, it is duress nonetheless: *Snowdon v Davis*, (1808), 1 Taun 359; *Maskell v Horner*, [1915] 3 KB 106, at p 120, per Lord Reading, CJ; and *Valpy v Manley*, (1845), 1 CB 594, at 602, per Tindal, CJ. There is clear authority for saying that money paid to prevent a wrongful sale by a chargee or mortgage with power of sale may be recovered in a restitutionary suit: see *Closs v Phipps* (1844) 7 Man & G 586; and the Indian cases of *Dooli Chand v Ram Kishen Singh*, (1881), L R 8 Ind App 93; and *Kanhaya Lal v National Bank of India*, (1913), 29 T L R 314. In such cases the threat to sell is duress because the plaintiff is commonly obliged either to pay the money or suffer his property to be sold. Clearly, duress of goods is closely allied to economic duress (sometimes discussed under headings like "economic duress" or "business compulsion", among others).

A payment made under pressing necessity to avoid a seizure of goods, or to obtain in release of goods, or to prevent some interference with, or withholding of, a legal right is compelled and not voluntary, and is therefore recoverable. As Dixon, CJ once said, there is a right to restitution where a payment was the outcome of actual, threatened or apprehended withholding of something to which the payor was entitled or the actual threatened or apprehended impeding of him in the exercise of some right of liberty: *Mason v New South Wales*, (1959), 102 CLR 108, at p 117; and Windeyer, J, at p 144. The right to recovery after demand *colore office* rests upon the assumption that the position occupied by the defendant creates virtual compulsion, where it conveys to the person paying the knowledge or belief that he has no means of escape from payment strictly so called if he wishes to avert injury to or deprivation of some right to which he is entitled, without such payment: Isaac J, in a dissenting judgement in *Sargood Bros v Commonwealth*, (1910 – 1911), 11 CLR 258, at p 301, a judgment which was afterwards cited with approval in *Bel Bros Pty, Ltd v Shire of Serpentine-Jarrandale*, (1960), 121 CLR 137.

It must be clear by now, that there must also be a casual link between the illegitimate pressure and the parting with the enrichment. It must be shown that if the payor would not have paid but for the illegitimate pressure which caused the payment. In dealing with the element of causation there is no requirement that the threat was the major or the only cause of the payment: it suffices if the threat was a cause. There may be more than one sufficient cause. All that needs to be shown is that the illegitimate means used was a reason (and not the reason, nor the predominant reason nor the clinching reason) why the complaint acted as he did. Moreover, a decisive answer is not obtainable by asking the question whether the payment would have been made even if there had been no threats because, even if the answer is affirmative; that does not prove that the payment was not made because of the threats: *Barton v*

Armstrong, [1976] AC 104, at pp 121 – 122 (PC); and *Crescendo Management Pty, Ltd v Westpac Banking Corporation*, (1989 – 1990), 19 NSWLR 40.

The absence of protest is sometimes, and in this case it was, adverted to as if important, but as eminent restitutionists point out, although protest is likely to indicate the plaintiff's awareness of a threat, it cannot be regarded as conclusive as to whether the threat caused the payment. It is only relevant in the sense that once a court is satisfied that illegitimate threats have been made or employed by the defendant, it will readily assume (especially, but not exclusively, where the payor protested), that those threats cause the payment to be made. See, among the great commentators of this view, Andrew Burrows in his illuminating essay,

"Public Authorities, *Ultra Vires* and Restitution", in Andrew Burrows (ed), *Essays on the Law of Restitution*, (1991), at p 49.

Throughout the annals of legal history to this day, the law has never been, and cannot be, reduced to counternancing stark injustice, or any trace of it, and cannever permit one party to carry audacity to the point of foolhardiness, or to unfairly use his dominating bargaining position. The law protects persons from innocent exploitation as well as conscious exploitation, provided that there appears to be an element of contrariness to justices. The appearances of innocence will not on their own exonerate a wrongdoing party. Thus, sometimes a coerced party may have been required to confer a benefit on a third party who is not party to, and has no knowledge of, the duress. On the face of it the third party may look innocent. Yet, in certain situations he must make restitution, and the money which has been paid to the third party may be recovered if one of the usual defences (like change of position) is not successfully erected against the claim: the third party must return the enrichment because he has been unjustly enriched at the plaintiff's expense. The Autstralian case of *Smith v Weldon* (1924), 34 CLR 29, at p 34, throws some light in this direction.

Also see Goff & Jones, *op cit*, at p 308.

These are the general principles in the law of restitution, which I believe are relevant to the facts of the instant case. Although some of them are elementary, as I have culled them from a number of common law jurisdictions with a jurisprudence similar or almost identical to our own. Kenya and East Africa, have not yet any or illuminating decisions on the subject. There is nothing inconsistent with our position; nor are there special circumstance sin Kenya which make these principles inapplicable in this country.

Those are the principles which must be constantly referred to as the facts of this case are considered. What are the material facts in this case? From the copious evidence of the plaintiffs and of the defendants, and from the eight sizeable bundles (A to H) produced by agreement as exhibits, where you will find crucial admitted or undeniable happenings, the Court has found the following key facts. The second plaintiff, Samuel Kamau Macharia, was the Chairman of the Board of Directors, and he was the driving force and engine of the first plaintiff, Madhupaper International, Ltd. He did everything the company sought to do; and all persons involved in this case and other cases involving the company dealt with him on behalf of, and for, the company and himself. He promoted Madhupaper International, Ltd, and he owned 95% shares of it.

The company was formed in 1976 to start the manufacture of toilet tissue to make toilet paper, utilizing waste paper. To start and run the business for which the company was formed, the company borrowed Shs 30 million from Kenya Commercial Bank, Ltd (the first defendant), on debenture security charging all the company's undertakings, goodwill assets, book debts and property (see page 97 of Bundle A). It also borrowed Shs 13 million on debenture, and Shs 6 million on a supplemental debenture, from Kenya Commercial Finance, Co, Ltd (the second defendant) (see pages 69 and 87, of Bundle A, respectively). In addition, the company borrowed Shs7 million from Kenya National Capital Corporation, Ltd (the third defendant), on securities comprised in all the assets debenture (see page 1 of Bundle A).

Repayment of these loans would be made out of monies to be initially borrowed from third persons. The monies borrowed were utilized in feasibility studies and initial pre-project costs. Repayment of the loans

because a problem, resulting in default on the part of the plaintiffs. The defendants, principally the first defendant acting on its own behalf and more or less as agent for the other two defendants (see for example page 110 of Bundle A), moved to exercise powers under the debenture instruments.

On October 25, 1985 an official of the first defendant bank (a Mr

Muthundo), accompanied by Mr R L E Kerr and Mr R D Cahill, went to the offices of the first plaintiff company and demanded of the second plaintiff (on behalf of the company), immediate payment of all monies owed by the plaintiffs to the three defendants, and warned that if no payment was immediately forthcoming, then Kerr and Cahill would take over at once as receivers and managers of the first plaintiff company. The total sum demanded immediately was Shs53,780,000 which was rounded off to be Shs54,000,000, as owing to the three defendants. The said sum of money was not immediately forthcoming. So, the receiver-managers took over the company.

Amidst all these things the company's intended project did not proceed, and the plaintiffs blamed it on the Government and the defendants. The Government's involvement was through the Chief Secretary's deep involvement in the recovery measuring as shown in the letters in the Bundles. So, the plaintiffs filed suits in the High Court seeking compensation from the Government and the three present defendants.

These cases included HCCC No 3438 of 1985, HCCC No 1126 of 1986, and HCCC No 3888 of 1988. In fact, in the 1985 suit, the plaintiffs sought, among other things, the lifting of the receivership aforesaid, to enable the plaintiff repay the loans; and in the 1988 one the plaintiffs sought orders allowing them to repay the debts, because the defendants were refusing to accept repayments offered by the plaintiffs.

While these things were happening, negotiations were undertaken between the plaintiffs and the defendants, with the defendants always consulting, bringing in, and acting according to instructions from the then Permanent Secretary in the Office of the President and Secretary to the Cabinet, Mr. J T arap Letting (see, for example, the letters dated February 7, 1989, and February 10, 1989, in Bundle A). An example of these negotiations with a view to a settlement will be found at pages 13-68, 105 – 175, of Bundle

A. A settlement was subsequently reached, and was reduced into writing in the correspondence between the plaintiffs, the defendants, and the said Permanent Secretary. The outcome were three basic points agreed between all the actors, which were the settlement to finalise the matter. They were these:-

1. The plaintiffs were to pay to the defendants Shs54 million agreed as the entire amount of the loans owed by the plaintiffs to the defendants, and the payment would be in full and final settlement of the debt.

2. The plaintiffs would withdraw all the then pending cases filed against the Government and the defendants.

3. Upon the plaintiffs fulfilling the foregoing two undertakings, the defendants would unconditionally lift and withdraw the receivership, discharge the charges and debentures, and hand back the company to the second plaintiff.

Upon the above settlement reached, the plaintiffs carried out their undertakings: they paid to the defendants the agreed sum of Shs54 million (see, for example, the photocopies of the cheques at pages 140-142 of Bundle A, and the admission in the evidence for the defendants), and withdrew the court cases (see the notice of withdrawal at pages 162, 166 and 168, of Bundle D, and the admissions in evidence.

On their part, the defendants temporarily removed the receiver-managers, and allowed the second plaintiff to resume the management of the company. But this lasted for one week only. After the one week, the Chief Secretary (ie the Permanent Secretary aforementioned) and the defendants, ordered the second plaintiff company out of the running of the first plaintiff company. The receivership of the company was slapped back. The defendants returned to the plaintiffs the sum of Shs54 million which the plaintiffs had paid under the settlement to which I have referred. No explanation, or no reasonable explanation was

advanced for this sudden turn of events whereby the defendants, apparently on instructions from the Chief Secretary, were going back on the settlement agreement. The second plaintiff was once more forced out, and he vacated the offices of the company. Some six or eight months afterwards, the defendants and the receiver managers agreed to sell the assets of the company to Ravi Investments Ltd. Ravi Investments, Ltd made to the defendants a 10% down payment, which was a sum of Shs14 million.

However, before the sale would proceed further than that, the second plaintiff again negotiated with the defendants over this matter. The defendants demanded from the plaintiffs a payment of Shs110 million, plus a refund of the down payment of Ravi Investment Ltd, in return for giving back the management of the company to the second plaintiff thereby avoiding the impending sale of the assets of the company. In fact Ravi

Investments Ltd's Shs14 million plus interest on it had to be paid before the defendants would accept to receive the payment to themselves of the demanded Shs110 million.

So, to save the situation, the plaintiffs capitulated, yielded to the demands: paid Ravi's Shs14 million first, and then paid to the defendants Shs110 million. This was on July 17, 1989 or a day after that. This payment was confirmed by, among other things, the letters of July 18, 1989 from the receiver-managers to Osmond and Sylvester, appearing at pages 171 and 172 of Bundle A, copied to the second plaintiff. (The plaintiffs afterwards sued Ravi Investments, Ltd, to reclaim the Shs14 million, but the suit was compromised and under the earlier mentioned settlement the plaintiffs got back the said money).

Strangely, however, despite the plaintiffs having paid these sums, the assets of the company were not handed back to the plaintiffs as agreed between the parties or at all. Instead, what happened was that the defendants unexplainably had those assets given to Ketan Somaia, Ajay Shah and

Isaac Githuthu. The plaintiffs say, and the defendants did not dispute or contradict it, that the plaintiffs surrendered to this turn of events on superior orders directing the plaintiffs to give up their claims to the assets, in return for the trio paying a sum of Shs250 million to the plaintiffs. Given the picture so far created by the various demands and involvement of the Chief Secretary, one would accept the plaintiffs' account of how they ended up not getting back their assets which had been charged to secure the loans.

The defendants' case is largely in agreement with the above outline of the facts I have summarized from the evidence and bundles of documents produced as exhibits. It is that the first plaintiff always represented by the Chairman of its board of directors (the second plaintiff), was granted various banking accommodation by the three defendants, secured by debentures on all of its assets. There was default in repayment of the monies due to the defendants. As a consequence of the default, receiver managers were appointed. After lengthy negotiations the receivership was lifted upon certain conditions, the principal one being a payment by the plaintiffs of a sum of Shs 54 million and withdrawal and abandonment of the cases aforesaid. The plaintiffs tendered cheques totaling that sum and abandoned litigation, but the defendants returned the cheques to the plaintiffs, and proceeded to sell the plaintiffs' assets, because of what the defendants called certain unacceptable terms of tender. I must say here at once that I was not satisfactorily or at all, shown any "unacceptable" terms or any reasonableness in considering anything "unacceptable".

Anyway, the purchaser paid, but on further negotiations it was agreed that the plaintiffs redeem the assets by paying the defendants and the purchaser the sums agreed. As the second defence witness (Simon Mburu Kariuki) admitted in his evidence on November 27, 2001, the sum agreed to be paid and was paid by the plaintiffs to the defendants and was received by the defendants, was Shs110 million, plus that of the purchaser. The witness added, "In the normal course of circumstances, the plaintiffs would then have got their assets back." He did not say whether there was anything that would have taken the plaintiffs' situation out of the normal circumstances.

As I see from the evidence on both sides, the essence is agreed. There was borrowing and initial default to repay by the plaintiffs, followed by financial reorgainisations of the company and in loan repayments, interrupted from time to time by appointments, going away, and return of receiver-managers. Repayable

sums differed in amounts on every subsequent demand. There was haziness about the amounts truly owed (This was clearly shown by the defendants' witness Simon Mburu Kariuki, who, after referring to the letters at pages 35 and 37 of Bundle E, talking about the total sums outstanding, he said, in respect of the Shs54 million demanded, that, "it was the entire amount which was owed to the debenture holders, and it would not have been Shs54 million outstanding," and then later on he says the amount agreed upon as owing was Shs101,681,369.94. Possession of the plaintiffs assets were returned to them at one stage on payment of demanded monies. Then they were again denied possession for no clear reason. Prospective purchasers were brought in. The plaintiffs were told of the impending sales. Sales took place. Sales were set aside after large sums of monies were exacted from the plaintiffs. Then plaintiffs were again dispossessed. More funds were exacted from them. The Chief Secretary was looming in the vicinity, approving of this, directing that, instructing and controlling what course to be taken by the plaintiffs. Conditions were heaped on the plaintiffs. Immediate compliance was demanded from the plaintiffs; and yet, according to the second witness for the defendant's "time limits were not of the essence". The same witness said that payment by the plaintiffs of Shs54 million would be in full and final settlement of the plaintiffs' indebtedness. Yes, as the third witness of the defendants, Jeremy Peter Okora, said in his evidence under crossexamination on February 13, 2992, "I do not know how the figure had risen from Shs54 million to Shs110 million".

The same Jeremy Peter Okora speaking for the defendants' case said in his evidence, that it was not necessary that any settlement between the plaintiffs and the defendants had to be approved by Government. This is correct, and it is in line with what the second defendants' witness, Simon Mburu Kariuki said, when he said that the defendants being corporate bodies, they were ran by a board of directors according to the regulatory requirements for such a body corporate, and "not on instructions of Government". But reading the letters at pages 18-19 of Bundle A and those at pages 81-83 of Bundle E, the third defence witness Jeremy Peter Okora, could "see the Government assisting in the recovery of the loans", and added, in his evidence, that "the Government, through Leting, handled the negotiations on behalf of the debenture holders; but I do not know how leting came in. It is there in writing, that the Government was involved in writing, that the Government was involved in the whole affair." In this respect he is also in agreement with the second defence witness who also openly stated in his evidence, that the Government's approval was sought and obtained by the defendants when dealing with the plaintiffs. The witness referred the Court to pages 82 and 83 of Bundle E for this conclusion, and the correspondence there fully supports these defence witnesses.

It does not escape the Court's attention, that the plaintiffs were driven by the defendants off, and from, the course of seeking justice through the legal process; it was demanded of them, and they had to yield if they were to save themselves from receivership, that all suits by them against the defendants, be withdrawn. They did so, in addition, to paying the sums demanded of them by the defendants. The defendants even escalated their demands by requiring the plaintiffs to pay third persons like Ravi Investments, Ltd, large sums of monies (Shs14 million with interest) when the plaintiffs had not been responsible for the third parties' incurring of the alleged expenditure.

It is agreed that the defendants demanded from the plaintiffs a sum of Shs54 million which if paid would be in full and final settlement of all the sums owed by the plaintiffs to the defendants under all the charges and debentures. It is also agreed that this sum was paid by the plaintiffs to the defendants, but the defendants after receiving the payment in full, returned it to the plaintiffs. It is further agreed that the defendant turned around and demanded from the plaintiffs the enhanced sum of Shs110 million.

The plaintiffs, it is admitted and I find it as a fact, paid the defendants, and the defendants received from the plaintiffs the said sum of Shs110 million. So, arithmetically, the difference between Shs110 million and

Shs54 million was a sum of Shs56 million. The sum of Shs 56 million is what the plaintiffs seek in this suit to recover under the doctrine of restitution of an unjust enrichment.

The plaintiffs have shown on a balance of probability, that the sum of Shs 56 million was an overpayment by them to the defendants on the latters' demand; that the plaintiffs were asked to pay Shs54 million and

they did so, but later on they were driven by force of the defendants to pay to the defendants Shs110 million, and they paid it accordingly. On the general principles which I have attempted to understand and outline in the earlier part of this judgment can it be correctly said that on a balance of probability, this payment of the extra Shs56 million to the plaintiffs was an unjust enrichment at the expense of the plaintiffs, by means of duress, and that the unjust benefit should be reversed? Was this payment and receipt, or benefit derived from the plaintiffs which it is against conscience that the defendants should keep it, and should, in justice, be restored to the plaintiffs?

Having regard for the facts which I have found and set out above, there are circumstances in this case which clearly justify a conclusion that there was a remedy-attracting wrong committed by the defendants against the plaintiffs for which, according to the ties of natural justice and equity, the defendants are obliged to make restitution. There were a number of unjust factors in this case which fall within some of those which I summarized fairly early in this judgment. These unjust factors included the defendants' abuse of their rights of a mortgage, chargee or debenture holder. How did they abuse those rights?

They did so in a number of ways, which may rightly be summarized and described as harassment of their debtors. Admittedly the plaintiffs fell into default in the repayment of the loans. But upon the default the plaintiffs embarked, in a vulturine fashion, upon a rapacious course: appointing receiver-managers to-day; extract payments from the plaintiffs the next day in pretence that on such payment receivership would be lifted; temporarily lifting the receivership; then suddenly slapping it back and chasing away the company's Chairman; bringing around purchasers to purchase the company's assets; receiving inflated payments from the plaintiffs under promises to give back the company and its assets. These things were so incessant and following so closely to each other that even during the brief interludes of temporary reprieve, the plaintiffs could not be able to do business and make money even to pay the loans demanded.

The defendants' actions created an uncertainty and anxiety under which the plaintiffs could not know their position the next day. The pressure from the defendants on the plaintiffs was so overbearing that it extracted from the plaintiffs the payments which were made. While a chargee, mortgage or debenture holder is entitled to seek ways under the charge, mortgage or debenture, to recover mortgagor, the ways, it employs must be reasonable, and not in a manner which frustrates or impedes the borrower to reasonably carry on his business under such peace of mind free from excessive anxiety caused by the creditors' terror tactics.

In the instant case one cannot sensibly accuse the defendants of having refrained from instilling inexcusable terror in the plaintiffs to thereby wring out the monies paid from the plaintiffs. If it was not for the only purpose of creating terror in the plaintiffs, why did the defendants enlist the assistance of the Permanent Secretary in the Office of the President and the Head of the Civil Service, who was not a director of any of the defendant companies? The defendants told the Court that they were ran by boards of directors. And yet the numerous references to Government by the defendants when dealing with the plaintiffs in the matter of the loans in question were not explained to the Court. The "approval" of Government was frequently invoked by the defendants. The Permanent

Secretary was brought into the matter from time to time, by the defendants, as if the defendants were not free to act without the said "approvals". On some occasions the second plaintiff was ordered out of the first plaintiff's premises by the Permanent Secretary. From the ever presence of the Permanent Secretary, it seems that this individual or his office was a very powerful one. That is why the defendants kept harping on his name as they relentlessly pursued the plaintiffs. As corporate bodies, the defendants could and should have acted without "approval" from "the Government" in a straight matter of contract to which "the Government" was not a party. But that the defendants would always seek and obtain the "approval" of the Government in a private transaction, it can only mean that the defendants were resorting to unorthodox means of applying pressure and compulsion on the plaintiffs, using the name of Government, or using an individual occupying an awesome position and ready to intermeddle in what did not concern him or Government.

To use an intermeddler who occupies a powerful office in the land, to get money paid by a person who is threatened with losing property or suffering other detriment, is to apply illegitimate pressure. In

particular, when the amounts of monies demanded are variously increased and demanded to be paid within arbitrarily set deadlines with no regard for realism and prevailing circumstances, with threats that dire prejudice will be suffered if the demands are not met, there is illegitimate pressure. And that is duress in the language of restitutionists. I am satisfied on the usual standard of proof in civil cases, on the balance of probability, that in this case, the plaintiffs paid to the defendants the sum of money claimed, under coercion and duress applied by the defendants.

The defendants literally camped at the offices of the plaintiffs, never letting the plaintiffs do any meaningful business to make money with which they could pay the defendants. The defendants succeeded in disorientating the plaintiffs, throwing them off mercantile balance, swamped them with unceasing fear and anxiety through an intemperate resort to receivership. Such, is a restitutionary factor I find in this case.

This is a case of unjust enrichment. The plaintiffs were like *Astley* of 1731, the plate pawner of whom Pounds 10 extra were demanded of him, of which under compulsion he paid Pounds 4, and afterwards recovered it because he had paid the surplus because he might have had "an immediate want of his goods" and did not have "his freedom of exercising his will." The plaintiffs in the instant case were in Astley's condition when under similar compulsion, with an immediate want of their assets and not having their freedom of exercising their will, they paid the extra or surplus sum of Shs 56 Million.

Like the *New Jersey Wolf* in 1959, this is a case of abuse of one's legal or contractual rights: the defendant's incessant threats of sale of the assets of the plaintiffs and demanding ever increasing amounts and requiring almost immediate payments when time was not of the essence. The plaintiffs were made to submit, for lack of a practical choice open to them, and the consequence of not submitting would be serious and immediate: they were in the 1983 *The Universe Sentinel* situation, and that of *B & S Contracts & Designs* in 1984. The defendants repeated seizure of the plaintiffs' assets with threats and extraction of payment from the plaintiffs of arbitrary amounts of monies, put this case in the class of *The Alev* in 1989.

The defendants kept on threatening what Lord Wright in *Thorne* in 1937, called doing "an act which was not unlawful, but which was calculated seriously to injure the plaintiffs", which, in the law of restitution, constitutes an unjust factor. This is a case of payment made under pressing necessity, to obtain release of the plaintiffs' assets, or to try to prevent interference with the right to operate the business, and this, in accordance with the widely influential exposition by the High Court of Australia in *Mason's* case in 1959, justifies judicial intervention to order restitution.

Involving the Government or the Chief Secretary painted the matter with the colour of demand *colore offici*, conveying to the plaintiffs clear knowledge or belief, that they had no means of escape from paying the extras and surpluses demanded of them.

The plaintiffs were forced to abandon the pursuit of justice. They had to withdraw court cases or suffer losing their assets. The plaintiffs withdrew the cases; but in the end they still lost their assets. They paid off the monies demanded; but in the end they lost their assets. This is a case of vitiated judgment: there was illegitimate pressure, unconscionable conduct on the part of the defendants, coercion, inequality between the parties, and lack of real choice for the plaintiffs. This is a case of failed consideration, for the plaintiffs paid the surplus sums on condition that they got back their assets, but after payment they did not get their assets. It is a case which falls within the first, second, the second part of the fifth (abuse of a contractual instrument – debenture), and the sixth unjust factors which I tabulated in the early part of this judgment.

Even if the debts would have been paid and had to be paid in any event, illegitimate pressure having employed to get the payment of the extra sums, there was unjust enrichment within the expositions in *Barton* in 1976, and *Crescendo* in 1989.

These things have the cumulative effect of rendering the conferment of the benefit upon the defendants by the plaintiffs an unjust enrichment. And, in any event, any one of those factors sufficed to attract the

Court's restitutionary response sought by the plaintiffs. The extra sum of shs 56 million was paid in those circumstances.

It was argued on behalf of the third defendants, that there was no evidence against them. That is not correct. Everything that was done against the plaintiffs was being done by all the three defendants. One set of advocates making demands of payment was making demand for all the three defendants. The total sums demanded and paid were in respect of the debts owed to each of the three defendants. You can see all these things from the numerous correspondence on the bundles of documents produced by consent of counsel as exhibits. For instance, see page 155 of Bundle A; the letters of Barclays Bank Plc to the defendants' lawyers at page 157, dated May 17, 1989, naming all the three defendants as the debenture holders to be paid £3 million by the plaintiffs; and the defendants' lawyers' letter at page 158; and the same lawyers' letter of June 27, 1989 to the plaintiffs' lawyers, at page 163. Finally, there is this letter of July 18.1989, at page 172, of Bundle A, from the receiver-managers, KPMG Peat Marwick to the third defendant's lawyer JDM Silvester of Messrs Hamilton Harison and Mathews Advocates, where after the plaintiffs had paid what was demanded, the receivers stated:

"I am please to inform you that Madhupaper International, Limited, has now cleared its indebtedness to its secured creditors. Mr RLE Kerr and Mr R D Cahill have thus been released as receivers, with effect from today's date."

A similar letter went to K H Osmond (see page 171). This correspondence contradicts any suggestion that the third defendant was innocent. And, even if there had been no such exposing record, it is clear that the third defendant benefited from the duress applied by or on behalf of the first defendant. So did the second defendant, as did the first defendant did directly. All the defendants knew of what was going on and received the unjust enrichment. None of them can pretend innocence. Clearly, therefore, the plaintiffs' suit succeeds against all the three defendants. The Court hereby awards judgment for the plaintiffs to recover from the defendants jointly and severally the unjust enrichment of Shs 56 million paid by the plaintiffs to the defendants under duress and coercive pressure which, in the circumstances set out, it is against conscience that the defendants should keep it, and they must, in justice, restore it to the plaintiffs. Judgment is, therefore, hereby entered for the plaintiffs against the defendants jointly and severally, in the sum of fifty six million shillings (Shs 56,000,000) with interest thereon. The defendants shall pay the plaintiffs the costs of this suit, and the interest thereon. It is so decreed by the Court.

Dated and delivered at Nairobi this 23rd day of January, 2003

R.C.N. KULOBA

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JUDGE